IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO.564 OF 2005

M/s. Sambhav Investment &
Private Limited. ... Appellant

Vs.

The Municipal Corporation of
Greater Bombay. ... Respondent

Mr. R.M. Nakhwa h/f. Mr. V.B. Dhawan for the appellant.

Mr. J. Xavier for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 27TH APRIL, 2005.

P.C.:-

1. Admit. Respondent waives service. By consent of the parties, taken up for final hearing.

2. The appellant is the original plaintiff and the respondent is the original defendant. For the sake of convenience, the parties are referred to in this judgment as per their status in the suit.

3. The plaintiff filed a suit being L.C. Suit No.7702 of 1999 in the City Civil Court at Bombay, inter alia, for a declaration that the order passed by the Additional Municipal Commissioner bearing No.KW/UPW/351/360 of 93-94 dated 11/6/1999 is illegal, bad in law, malafide and is of no legal effect. By the impugned order, the plaintiff's suit was dismissed. Hence, this appeal.

4. At the trial, the plaintiff's case was that the plaintiff is a member of Jalpankhi Co-operative Housing Society Limited. Somewhere in the year 1993, the plaintiff carried out minor repairs, renovations and decorations in its bungalow (for convenience, "the suit property"). It is the case of the plaintiff that these renovations and decorations are minor in nature and they do not require any prior permission of the defendant-Corporation. However, the defendant- Corporation issued a notice under section 351 of the Mumbai Municipal Corporation Act (for short "the MMC Act") dated 28/8/1993 stating that the defendant had carried out unauthorised construction of two rooms in the open space admeasuring about 25' x 15' and 25' x 15' on the ground floor and 10' x 10' on the first floor of the suit property. The plaintiff was asked to show cause as to why the said construction should not be pulled down. The plaintiff then replied to the said show cause notice on 13/9/1993 which was followed by another reply dated 19/10/1993. The Deputy Municipal Commissioner by his order dated 21/11/1993 held that the construction of the room in the open spaces admeasuring 25' x 15' and 25' x 15' on the ground floor is not unauthorised. He, therefore, directed that the demolition action in respect of that construction be dropped. So far as the construction of the room admeasuring 10' x 10' on the first floor is concerned, he came to the conclusion that this construction is unauthorised and the same may be demolished. Thereafter, Additional Municipal

Commissioner issued a show cause notice dated 5/3/1995 in respect of the same structure, asking for an explanation from the plaintiff as to why the same should not be demolished. It was stated in the notice that the order dated 27/11/1993 passed by the Deputy Municipal Commissioner was beyond the powers vested in him and hence it was not binding on the Corporation. The plaintiff sent a reply dated 16/3/1995 to the said show cause notice. Thereafter, the Additional Municipal Commissioner by his order dated 11/6/1999 came to the conclusion that the construction was unauthorised and he ordered that notice dated 28/8/1993 issued under section 351 of the MMC Act should be enforced. The plaintiff has challenged the said order in the instant suit. The defendant-Corporation filed its written statement and denied the case of the plaintiff. At the trial, the following issues were framed.

" **ISSUES**

1. Whether the suit of the plaintiffs is maintainable for want of statutory notice u/s. 527 of B.M.C. Act?

2. Whether the plaintiffs prove that they had merely carried out minor repairs, renovation and decoration to the suit premises which were of such a nature that it did not require any permission from corporation ?

3. Whether the work done by the plaintiffs in the suit premises required permission as contemplated under MMC Act and without that the work is unauthorised.

4. Whether the suit notice and the suit order are valid and proper?

5. Whether the plaintiffs are entitled to get the reliefs sought for in the present suit?

6. What order and decree?"

On 17/8/2004, additional issue was framed at the request of the advocate for the plaintiff. The said additional issue is as under:

" **ADDITIONAL ISSUE**

1. Whether the suit Order dated 11/6/1999 of Additional Municipal Commissioner is valid and proper in view of legal position?"

5. Thereafter, the advocate for both sides agreed to make oral submissions on the additional issue alone.

Accordingly, oral submissions were made and the trial court by the impugned order held that the order dated 11/6/1999 passed by the Additional Municipal Commissioner is valid and proper and in view of this, the trial court dismissed the suit. That order is challenged in this appeal.

6. I have heard Mr. Nakhwa, the learned counsel appearing for the appellant and Mr. Xavier, the learned counsel appearing for the respondent. Mr. Nakhwa contended that it was wrong on the part of the learned trial judge to decide only the additional issue and non suit the plaintiff. He submitted that the learned trial judge ought to have decided all the other issues. Mr. Xavier, the learned counsel for the respondent pointed out that the additional issue was framed at the instance of the learned counsel for the plaintiff and, it is after recording the consent of the learned counsel for the plaintiff, that the trial judge proceeded to hear the oral submissions and decided the suit and, hence, the learned trial judge cannot be faulted for passing an order of dismissal of the suit.

7. It does appear from the trial court's judgment that the plaintiff's counsel conceded that the additional issue should be decided first and, therefore, the trial court has decided it. There is some substance in Mr. Xavier's contention that the plaintiff itself invited the order. All the same, in my opinion, the facts and

circumstances of the case are such that the trial court should have decided all the issues together. Interest of justice demands that the impugned order is set aside and the matter is remanded to the trial court with a direction to the trial court that all issues be decided together. Hence, the following order:

8. The impugned order dated 20/10/2004 passed by the City Civil Court at Mumbai in L.C. Suit No.7702 of 1999 is set aside. The suit is remanded to the trial court. The trial court is directed to record the evidence and hear and dispose of the suit within a period of one year from the date of receipt of this order by it in the light of the above order.

9. All contentions of both sides are kept open. Parties to appear before the trial court on 7/6/2005.

10. Needless to say that the ad-interim relief shall continue till such time as the suit is finally heard and decided by the trial court.

11. All concerned to act on the authenticated copy of this order.

(SMT. RANJANA DESAI, J.)